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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. _____

S. MONTAGUE STONE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, S. Montague Stone, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on October 1, 1970.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Southern District of Florida.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was rendered on October 1, 1970. A timely petition for rehearing was denied on October 21, 1970, and this petition for certiorari was filed within 30 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether a taxpayer's reasonable, good faith reliance on a competent CPA for the preparation of a taxpayer's income tax returns constitutes a complete defense as a matter of law to the crime of willful income tax evasion under 26 U.S.C. Sec. 7201?

2. Whether a trial judge in a federal criminal case may ask a testifying defendant a question indicating the trial judge's belief in the defendant's guilt?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 26:

Sec. 7201

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

STATEMENT OF THE CASE

On March 20, 1968, the petitioner was charged in a three count indictment with willful income tax evasion for the calendar years 1961, 1962, and 1963 (26 U.S.C. Sec 7201) in the United States District Court for the Southern District of Florida (R. 356-359). On August 11-13, 1969, the petitioner was brought to trial by jury on his plea of not guilty before the Honorable Emett C. Choate, Senior United States District Court Judge for the Southern District of Florida (R. 1-355). On August 13, 1969, the jury found the petitioner guilty as charged (R. 353, 357). On December 1, 1969, the petitioner was sentenced to four (4) years imprisonment on Count I of Indictment plus three (3) years probation on Counts 2 and 3 of the Indictment (R. 390). On October 1, 1970, the United States Court of Appeals for the Fifth Circuit affirmed. This petition for a writ of certiorari follows.

The petitioner is a physician who has practiced medicine in the Miami, Florida area with only minor interruptions since 1951 (R. 247-248). In 1952, the petitioner retained a C.P.A. in Miami Beach, Florida, Mr. Irving Weiner, to prepare the petitioner's federal income tax returns (R. 39-40). Mr. Weiner's accounting firm prepared the petitioner's federal income tax returns for the years 1952-1964, 1966 (R. 40). Mr. Weiner personally prepared the petitioner's 1964 federal income tax return; Mr. Ira Kestrin and Mr. Joseph Walzer, Mr. Weiner's accounting associates, prepared the petitioner's 1962 and 1963 federal income tax returns respectively (R. 61, 111-112, 125-126). Mr. Weiner billed the petitioner approximately $350-$450 a year for such services (R. 84).

For the calendar years 1962-1964, the petitioner gave to his accountants the following records which were taken to the accountant's officers to prepare the defendant's federal income tax returns: A daily logbook reflecting income from the defendant's medical practice, the monthly bank statements of the petitioner, the cancelled checks written by the petitioner, and the check stubs of the petitioner's checking account (R. 46, 48, 51, 113, 126, 253-254). The petitioner also supplied the accountants with additional information concerning his income and expenses, including interest income from his savings accounts contained in his savings passbooks (R. 44, 62, 113, 254). The petitioner showed the accountants his savings passbooks for their examination in his office, but did not permit them to take the savings passbooks from his office because he considered them too valuable (R. 254). The petitioner's savings banks did not issue a 1099 form to their depositors, including the petitioner, stating annual interest earned on the savings accounts for the calendar year 1962 (R. 236, 239, 245-246), but apparently did so for the years 1963 and 1964.

Mr. Weiner's accounting firm prepared the petitioner's 1962, 1963 and 1964 federal income tax returns, mailed same to the defendant with instructions to sign the return, send a check to Internal Revenue for the taxes, and send a check to the accountants as per their bill (R. 41, 251). The petitioner complied with these instructions for the calendar years of 1962, 1963, and 1964 and paid the taxes as computed by the accountants (R. 283-284).

The petitioner reported substantial gross income from his medical practice in Schedule C (Statement of Profit and Loss for an Individual Business or Profession) at-

tached to his 1962-1964 federal income tax returns, to wit: $25,678 (1962), $33,981.80 (1963), and approximately $45,000 (1964) (R. 117, 129, 135, 325, Government Exhibits 1A, 1B, 1C). The petitioner further reported substantial interest earned from savings accounts in his 1962-1964 tax returns, to wit: $3,052.29 (1962), $3,394.25 (1963), and $4,844.16 (1964) (R. 62, 65, 116, 130, 131, Government's Exhibits 1A, 1B, 1C). After deducting business expenses and personal deductions, the petitioner computed his taxable income in his 1962-1964 tax returns to be $5,833.37 (1962), $11,300.30 (1963) and $24,331.50 (1964) (R. 62-63, 65, 66, 130, 231, Government's Exhibits 1A, 1B, and 1C).

The Government contended that the petitioner's taxable income for the calendar years 1962-1964 was $48,623.94 (1962), $29,082.07 (1963), and $39,541.71 (1964) (R. 228-231). The Government based this contention on a net worth theory. The Government established that the petitioner's net worth increased $36,464.26 in 1962, $20,419.37 in 1963, and $27,306.76 in 1964, and that the petitioner's personal non-deductible expenditures were $11,224.29 in 1962, $14,076.01 in 1963 and $17,579.23 in 1964 (R. 204-205, 215). The Government finally established that the petitioner did not record in his daily log book a $2,815 check made payable to the petitioner in February, 1962 (R. 28, 114-115).

At the trial the petitioner contended that he relied in good faith upon Mr. Weiner's accounting firm to prepare an accurate income tax return for him in the calendar years 1962-1964, that he gave his accountants all the records and information which were available to the Internal Revenue Service's accountants, and that, if his taxable income was inaccurately reported, it was not done willfully on his part (R. 15-18, 318-326).

The petitioner testified in his own behalf at the trial and gave testimony supporting his defense stated above (R. 248-294). During cross-examination of the petitioner, the trial judge asked a question which strongly accused the petitioner of knowingly evading a substantial portion of his income taxes for 1962, to wit:

"Q. Let's take the year 1962. Do you remember back in 1962 when you signed Government's Exhibit 1-A, that it purported to show roughly $5800 taxable income? Do you remember that at that (297) time, sir?

A. Yes, sir.

Q. I am talking about at the time you signed your name to it.

THE COURT:

He said he remembered it.

BY MR. DANIEL:

Q. When you signed your name, did you have reason to believe that you had in fact earned more than $5800 during that year?

A. I received a printed instruction. I repeat that I received a printed instruction from Mr. Weiner, who sent in this and said, 'Doctor Stone, please sign on the dotted line and send the Government X number of dollars, and here is my bill.'

THE COURT:

> Actually, though, you knew that you received pretty near ten times that amount?

THE WITNESS:

> Perhaps I did receive more than that. I don't know how much more, your Honor." (R. 283-284)
>
> (Emphasis supplied)

In his instructions to the jury, the trial judge strongly implied that the petitioner had willfully evaded a substantial portion of his federal income taxes as charged by the Government (R. 331-349). Specifically, the trial judge summarized the Government's position, without thereafter stating the petitioner's position, and clearly implied his agreement with the Government's position, to wit:

> "The Government here has undertaken to show you that the defendant did receive during each of these years more money than he reported as income. I think we can all agree that the sources that were also shown, namely, medical fees received by him, interest received by him on savings accounts and like and perhaps a few other items of not too consequential nature, and the Government has attempted to establish that during those years that he received a considerable amount in excess of what he reported as having received, and when they add up that amount and compare it with the amount reported, they assert that he did make an understatement of the

> taxable income that he received each year, and that it was a material understatement, and that he did it intentionally, willfully, with intent to defeat the Government and avoid his taxes in part or whole; and by this mathematical calculation, the Government has (362) brought before you certain evidence which they claim establishes a material understatement in each year of his taxable income in which they claim was done willfully and intentionally with intent to cheat or defraud the Government." (R. 348-349)

At the close of the Government's case, and at the close of all the evidence, the petitioner made timely motions for a judgment of acquittal, which motions were denied (R. 233-234, 295-296).

REASONS FOR GRANTING WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL ON WHETHER A TAXPAYER'S REASONABLE, GOOD FAITH RELIANCE ON A COMPETENT CPA FOR THE PREPARATION OF A TAXPAYER'S INCOME TAX RETURNS CONSTITUTES A COMPLETE DEFENSE AS A MATTER OF LAW TO THE CRIME OF WILLFUL INCOME TAX EVASION UNDER 26 U.S.C. Sec. 7201.

In the instant case, the court below held that a taxpayer's reasonable, good faith reliance on a competent CPA for the preparation of his income tax return is "purely a question of fact for the jury" as a defense in a prosecution for income tax evasion under 26 U.S.C. Sec. 7201 and does not entitle the taxpayer to a judgment of acquittal.

This decision is in conflict with United States v. Pechenick, 236 F.2d 844 (3rd Cir. 1956), in which the Third Circuit Court of Appeals held that such reliance by a taxpayer constitutes a complete defense as a matter of law to a prosecution for income tax evasion (under a comparable Statute 26 U.S.C. Sec. 145(b)) entitling the taxpayer to a judgment of acquittal. Moreover, the decision of the court below casts in serious doubt a line of civil tax fraud cases which hold that such reliance by a taxpayer constitutes a complete defense as a matter of law to a suit by the Government to assess tax penalties against the taxpayer for substantial understatements of income or failure to report any income. Haywood Lumber and Mining Co. v. Commissioner of Internal Revenue, 178 F.2d 769 (2nd Cir. 1950); Davis v. Commissioner of Internal Revenue, 184 F.2d 86 (10th Cir. 1950); Hatfried v. Commissioner of Internal Revenue, 162 F.2d 628 (3rd Cir. 1947).

The court below fails to discuss the above cases and leaves in its wake considerable confusion on whether taxpayers can continue to rely on the expert tax advice of competent CPA's in the preparation of tax returns. Since this is a wide spread practice involving millions of taxpayers, it is submitted that the conflict in this area is of substantial national importance to warrant the invocation of this Honorable Court's certiorari jurisdiction.

2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL ON WHETHER THE TRIAL JUDGE IN A FEDERAL CRIMINAL CASE MAY ASK A TESTIFYING DEFENDANT A QUESTION INDICATING THE TRIAL JUDGE'S BELIEF IN THE DEFENDANT'S GUILT.

In the instant case the court below held that it was permissible for the trial judge in a federal criminal case to accuse a testifying defendant of knowingly reporting a substantial understatement of income in his tax returns in a prosecution for willful income tax evasion under 26 U.S.C. Sec. 7201. This holding is in conflict with a line of decisions by other courts of appeal which hold that it is impermissible for a trial judge in a federal criminal case to ask a testifying defendant a question indicating the trial judge's belief in the defendant's guilt. **United States v. Fry**, 304 F.2d 296 (7th Cir. 1962); **United States v. Brandt**, 196 F.2d 653 (2nd Cir. 1952); **Billeci v. United States**, 184 F.2d 394 (D.C. Cir. 1950). Moreover, it conflicts with a similar line of decisions by the Fifth Circuit Court of Appeals. **Gemila v. United States**, 146 F.2d 372 (5th Cir. 1944); **Hunter v. United States**, 62 F.2d 217 (5th Cir. 1932); **Adler v. United States**, 182 Fed. 464 (5th Cir. 1910).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Circuit Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of November, 1970, a copy of the above Petition for Writ of Certiorari was mailed postage prepaid to JOHNNIE M. WALTERS, Assistant Attorney General, Department of Justice, Washington, D.C. and to ROBERT W. RUST, Office of the United States Attorney, Miami, Florida. I FURTHER CERTIFY that all parties required to be served have been served.

PHILLIP A. HUBBART
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Miami, Florida 33131

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 29101

Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

S. MONTAGUE STONE,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(October 1, 1970)

Before BROWN, Chief Judge, MORGAN and INGRAHAM, Circuit Judges.

BROWN, Chief Judge: Dr. Stone was convicted in a jury trial on three counts of willfully attempting to

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*Rule 18, 5th Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5th Cir., 1970, —— F.2d ——, Part I [No. 29278, August 14, 1970].

evade his income tax for the years 1962-1964.[1] Appellant here urges his conviction be reversed because [i] the evidence of willful tax evasion is insufficient to support the verdict, [ii] the Judge committed plain error by asking Appellant a question that manifested the Court's belief in his guilt; and [iii] the District Court committed plain error in failing to give the defensive instruction that if Appellant reasonably and in good faith had relied upon his accountants to prepare accurate income tax returns, he could not be convicted for the willful evasion of taxes. We find these contentions to be without merit and affirm the conviction.

I. Background

Dr. Stone had been practicing medicine in Miami, Florida for approximately 18 years prior to his indictment in 1969. During that time his tax returns were personally prepared by Irving Weiner, a Certified Public Accountant, or by one of Weiner's employees. The accountants determined Dr. Stone's taxable income from daily log books reflecting the taxable income acquired from his medical practice, monthly bank statements, cancelled checks and check stubs, and from interest income recorded in his savings account passbooks. On cross-examination the Doctor admitted destroying all those materials from which the

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[1]The statute violated is 26 U.S.C.A. § 7201 (1967):

> "Attempt to evade or defeat tax
>
> 'Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

Government could have determined the amount of taxable income he had received during the years 1962-1964, including the worksheets prepared by his accountants in 1963 and 1964.[2] Fortuitously the accountants retained their worksheets for the year 1962.

Because documentation was so scarce, this was a classic case for using the net worth-expenditures method of proof. See Holland v. United States, 1954, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150. Appellant does not seriously question that the Government established that his net worth increased $26,464.26 in 1962, $20,419.87 in 1963, and $27,306.76 in 1964, and that his personal non-deductible expenditures were $11,224.29 in 1962, $14,076.01 in 1963, and $17,579.23 in 1964.[1]

II. Sufficiency Of The Evidence Of Willful Evasion

In the prosecution of a § 7201 violation the Government establishes a prima facie case by showing a deficiency in the defendant's tax return plus a willful, affirmative act by the accused constituting an evasion or attempted evasion of the tax owed. Sansone v. United States, 1965,

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[2]It was customary for Mr. Weiner to give the worksheets compiled during the income tax computation to the Doctor, rather than to retain them in his own records.

[1]Based upon those figures it was further established that Appellant's true income and resulting tax liability compared with the figures reported on the returns were as follows:

		Taxable Income		*Income Tax*	
Count No.	Year	Reported	Corrected	Reported	Corrected
1	1962	$ 5,833.37	$ 48,623.94	$1,041.49	$19,326.27
2	1963	11,300.43	29,082.07	2,241.87	8,732.33
3	1964	24,331.50	39,541.71	5,217.33	12,581.61
Totals		$41,465.30	$117,247.72	$8,500.69	$40,640.21

380 U.S. 343, 85 S.Ct. 1004, 13 L.Ed.2d 882; **Holland v. United States**, 1954, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150; **Spies v. United States**, 1943, 317 U.S. 492, 63 S.Ct. 364, 87 L.Ed. 418.

Appellant does not really dispute the deficiencies in his tax returns for the years 1962-1964, but argues vigorously that the Government conspicuously failed to prove a willful attempt to evade payment of those taxes. He contends that willfulness cannot be inferred from the mere understatement of income but must be shown by independent proof. Whatever validity this might have as a single, sole element[4] the record here reflects a number of factors which **Spies, supra**, holds may warrant the inference of willfulness. An "affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes." ____ U.S. ____, ____. Here the Government has established that during the years 1962-1964 Appellant followed a persistent pattern of under-reporting large amounts of income,[5] a failure to enter all of his income in his books

[4]See Holland v. United States, 1954, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150.

[5]See table, note 4, *supra*.

and records,[4] a deliberate destruction of his books and records, and his habit of personally cashing patients' checks and depositing the cash rather than the checks, which allowed him to avoid entry of those payments in his books. Collectively this was quite ample.

III. Good Faith Reliance On Accountant

Appellant argues further that he placed total, good faith reliance upon a competent CPA to compute his tax returns accurately, and the deficiencies were the result of the accountant's negligence. This contention goes both to the sufficiency of the evidence and to the attack on the Court's jury charge. The credibility of this contention was purely a question of fact for the jury, who decided it adversely to Dr. Stone. Based upon a thorough review of the record we are in accord with their finding.

It just may be that this defense was the worst one the Doctor could have asserted. For it established that whatever the accountants had they obtained from the Defendant. And what he furnished turned out to be spectacularly wrong.

Mr. Weiner, Appellant's accountant for over 15 years, testified that he had computed Dr. Stone's account during each of those years, including 1962-1964. He personally made an annual visit to Dr. Stone's office to obtain all

[4]For example, as shown by his accountant's worksheets for 1962, based upon the Doctor's log book for that year, Appellant reported his total receipts for February to be $2,256.00. However, the prosecution proved that on February 16, 1962 Dr. Stone received a check for $2,815.00 that clearly was not included in the $2,256.00 total monthly income recorded in the log book for February 1962.

of his sources of taxable income, and relied completely upon the Doctor or his wife to supply him with a comprehensive register of the taxable income. Mr. Weiner would then take this material to his office where either he or his employees would compute the Doctor's returns. Once this was finished he returned both the records and his worksheets to the Doctor. Mr. Weiner inadvertently retained possession of his worksheets for 1962. Those worksheets reveal Dr. Stone had reported only $5,800.00 in taxable income for 1962. The reconstructed records show that in that same year the Doctor made life insurance payments of $5,900.00, increased his bank deposit nearly $25,000.00, and had personal expenditures alone of $11,000.00.

The accountant's employees similarly testified that any tax returns they computed were based upon all of the Doctor's taxable income, the source of such information being the Doctor himself. It rounds this out to state that the effort to put the blame on others — a tactic with built-in hazards — was not accepted by the jury.[7]

IV. Failure To Instruct On Defensive Theory

In his final contention Appellant argues it was "plain error" for the District Court to fail to submit the following charge to the jury:

> If you find that the defendant had discussed this matter with competent tax counsel and that the tax return herein was prepared pursuant to that

[7]The Doctor's credibility on this matter may well have been weakened by the similar attack and accusations he made against his secretary of many years.

> advice, then you must find that the defendant did not willfully file a false return or make a false statement, and you should bring in a verdict of not guilty.

This too is a pure afterthought since no request was made and in response to a specific inquiry by the Judge concerning any omissions in his charge defense counsel answered in the negative.

By his failure to seasonably object to the deletion of this defensive charge "before the jury retire[d] to consider its verdict", Appellant waived any complaint he may have validly presented. F. R. Civ. P. 30. Nor is the Doctor saved by the redeeming reaches of Rule 52(b), F. R. Civ. P. It does not reach the status of plain error, if it was error at all. The if is a big one since the instruction now proposed, never requested and never objected to, is full of holes — the most notable being that nothing is required under it save discussion with a tax advisor, with not even the slightest requirement of full, fair disclosure by taxpayer.[8] Next, in considering the charge as a whole, the substance of the correct defensive theory was given.[9] Certainly this is true in the context of plain error.

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[8]Appellant cites Bursten v. United States, 5 Cir., 1968, 395 F.2d 976, which reversed for failure to give a substantively correct instruction on good faith reliance. This was against the background of the trial Judge's basic conclusion that no such charge in any form was permissible. We were careful to point out some deficiencies including full disclosure.

[9]The charge over and over again emphasized the Government's burden to prove a willful intent to evade taxes. In the light of the evidence, the counsels' jury arguments and the charge which included the following, it is clear the jury sensed the significance of the theory of good faith reliance on his accountants:

V. Interrogation Of Defendant

During Dr. Stone's cross-examination he was asked the following questions:

"A defendant is not willfully evading a tax if all that is shown that he is careless about keeping his books. He is not willfully evading a tax if all that is shown is that he failed to hire competent bookkeepers or accountants. It must be shown that he willfully performed acts with intent to defraud the Government, to deceive them, in order to cheat the Government from the proper tax which was due from him.

Now, the accused is charged here that he did willfully seek to defraud the Government on income tax returns for these three years and you have heard the evidence on that. As a part of that, it must be established beyond a reasonable doubt that he did things that he should not have done contrary to law in order to defraud the Government of the proper taxes. It must be established that he did these acts willfully, that he did them knowingly, with bad heart and with bad intent. It means having the purpose on his part to cheat or defraud the Government. It is not enough if all that is shown is that the defendant was stubborn or stupid, careless, negligent, or grossly negligent. A defendant is not willfully evading a tax if all that is shown is that he is careless about keeping his books. He is not willfully evading a tax if all that is shown is that he failed to hire competent bookkeepers or accountants. It must be shown that he willfully performed acts with intent to defraud the Government, to deceive them, in order to cheat the Government from the proper taxes which was [sic] due from him.

To attempt to evade or defeat the taxes involves two things: first, an intent to evade or defeat the tax or a substantial amount; and second, a willful act intentionally done in furtherance of such intent. So the word "attempt" contemplates that the accused had knowledge and understanding that during the calendar year in question he had an income which was taxable, and which he was required by law to report, but that he nevertheless attempted to evade or defeat the tax thereof, or a substantial portion thereof, by willfully failing to report all the income which he knew he had during the calendar year in question, in which he knew it was his duty under

"Q. Let's take the year 1962. Do you remember back in 1962 when you signed Government's Exhibit 1-A, that it purported to show roughly $5800 taxable income? Do you re-remember that at that time, sir?

A. Yes, sir.

Q. I am talking about the time you signed your name to it.

THE COURT:

He said he remembered it.

BY MR. DANIEL:

Q. When you signed your name, did you have reason to believe that you had in fact earned more than $5800 during that year?

A. I received a printed instruction. I repeat that I received a printed instruction from Mr.

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the law to state in his return for such year, and that he did that in some way or manner intending to defeat the Government or evade the payment of the taxes. Various schemes and subterfuges and devices may be resorted to in an attempt to evade taxes * * * *

If a person in good faith believes that he paid all the taxes he owes, he cannot be guilty of criminal intent to evade the tax. But if the person acted without reasonable grounds for belief that his conduct was lawful, then it is for the jury to decide whether he was acting in good faith or whether he willfully intended to evade the taxes.

This issue of intent — and if you find the defendant willfully evaded the taxes — is one for the jury to determine. The jury must determine that from a consideration of all the evidence in the case, bearing upon the mind of the accused."

> Weiner, who sent in this and said, "Doctor Stone, please sign on the dotted line and send the Government X number of dollars, and here is my bill."

THE COURT:

> Actually, though, you knew that you received pretty near ten times that amount? (emphasis ours).

THE WITNESS:

> Perhaps I did receive more than that. I don't know how much more, your Honor."

Appellant contends that the question interposed by the Court constitutes "plain error affecting the substantial rights" of the Doctor because "the trial Court in effect accused the defendant of being guilty of willful income tax evasion [and although] no objection was made to the accusation * * * none was necessary since it utterly destroyed the defense in the case and deprived the defendant of a fair trial."

Thus the issue to be resolved is whether the District Judge contravened the revered constitutional line between a fair trial by jury, and a trial uninfluenced by comments or opinions of the trial judge indicating his belief in the accused's guilt.

We are perfectly clear that this sole question asked by the Judge did not "[c]ut into the presumption of innocence to which [defendant was] entitled". United

States v. Brandt, 2 Cir., 1952, 195 F.2d 653. stantial rights" of the Doctor because "the trial may not ask questions or make comments that indicate, directly, or indirectly, the defendant's guilt,[10] the Court nevertheless, in the aid of truth and the furtherance of justice, may question a witness. Gomila v. United States, 5 Cir., 1944, 146 F.2d 372.

In this instance the defendant had evaded the prosecutor's question and the Court merely sought a responsive answer. The proof is once again the puddings eating, for counsel made no objection, motion for a mistrial, or for other Court instruction to the jury. Now, as an afterthought, he vigorously asserts what was not clear to anyone present — that the single question asked by the trial Judge convinced the jurors of his belief in the defendant's guilt. Viewing the record as a whole we are unable to discern any prejudice arising from the question nor anything about it which would indicate to the jury that the Judge was "[i]nterested in the case on the side of the prosecution." Blumberg v. United States, 5 Cir., 1955, F.2d 496.[11]

AFFIRMED.

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[10]See, e.g., Quercia v. United States, 1933, 289 U.S. 464, 77 L.Ed. 1321, 53 S.Ct. 698; United States v. Murdock, 1933, 290 U.S. 389, 78 L.Ed. 381, 54 S.Ct. 223; United States v. Hill, 7 Cir., 1961, 332 F.2d 105; United States v. DeSisto, 2 Cir., 1961, 289 F.2d 833; Holmes v. United States, 4 Cir., 1959, 271 F.2d 635; United States v. Carmel, 7 Cir., 1959, 267 F.2d 345; Blunt v. United States, D.C. Cir., 1957, 244 F.2d 355; Blumberg v. United States, 5 Cir., 1955, 222 F.2d 496; Zenouni v. United States, 5 Cir., 1955, 226 F.2d 826.

[11]Appellant cites numerous cases in support of his position. None compel reversal here: Quercia v. United States, 1933, 289 U.S. 461, 53 S.Ct. 698, 77 L.Ed. 1321; United States v. Murdock, 1933, 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381; United States v. Fry, 7 Cir., 1962, 304 F.2d 296; Gomila v. United States, 5 Cir., 1944, 146 F.2d 372; Adler v. United States, 5 Cir., 1910, 182 F.2d 464; Zenouni v. United States, 5 Cir., 1955, 226 F.2d 826. Further,

counsel in the cases cited by appellant made immediate objections to the questions or behavior of the Judges. This indicates that the prejudice emanating from the questions or behavior was so flagrant that it could not have gone unnoticed by the jurors. However, the record in this case discloses a salient absence of an objection to the question at the time it was asked, or a subsequent request by counsel for an instruction by the Court. This reinforces our view that the question was not "devastating" to the defense, nor influential on the jury in its decision and return of a verdict of guilty. Accordingly, we find appellant's second contention completely lacking in merit.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 997

S. MONTAGUE STONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted, after a jury trial, of having wilfully attempted to evade his income tax for the years 1962, 1963 and 1964, in violation of Section 7201 of the Internal Revenue Code. He was sentenced to four months on count one (not four *years*, as the petition states (Pet. 3)) and to three years' concurrent probation on counts two and three (R. 389-390). The court of appeals affirmed, and denied a petition for rehearing on October 21, 1970 (Pet. 2). The peti-

tion for a writ of certiorari was filed on November 23, 1970, and is thus out of time under Rule 22(2). In any event, the contentions presented in the petition are plainly without merit.

Petitioner was a practicing physician during the years in issue. His tax returns were prepared by a certified public accountant from records furnished by petitioner or his wife, which purportedly contained complete and accurate information (R. 40-41, 44-46, 48, 50-51). Petitioner destroyed all those materials and thus they were not available to document petitioner's returns (R. 263, 264). Accordingly the government reconstructed petitioner's income using the net worth-expenditures method, which established that petitioner had substantially understated his income for the years involved (R. 228, 231-232).

Petitioner asserts (Pet. 8-9) that he was entitled to an acquittal as a matter of law because he relied upon his accountants to prepare accurate returns. But the government's evidence tended to show that petitioner was not making a full, fair disclosure to his accountant, and the jury agreed with this view of the matter. In these circumstances, petitioner was not entitled to acquittal merely because he did not prepare the returns himself.

Nor is there substance to the argument (Pet. 10) that the trial judge committed plain error by asking one question which allegedly indicated he believed petitioner was guilty. The question (Pet. 7) does not, in context, justify any such inference; as the court below concluded (Pet. App. 11), it simply sought an answer responsive to the cross-examination.

Moreover, the asserted "comment" by the judge was so innocuous that petitioner did not object to it until the appeal. In these circumstances, the court below properly found no plain error within the reach of Rule 52(b), Federal Rules of Criminal Procedure.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1970.

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